IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:	)	Chapter 7 Case
	)	Number 95-10587
ROBERT DEMELLO, JR.	)	
	)	
Debtor	)	
	)	
	)	
SEARS, ROEBUCK AND COMPANY	)	FILED
	)	at 3 O'clock & 21 min. P.M.
Plaintiff	)	Date: 2-12-96
	)	
vs.	)	Adversary Proceeding
	)	Number 95-01060A
ROBERT DEMELLO, JR.	)	
	)	
Defendant	)	

ORDER

Sears, Roebuck and Company ("Sears") filed this adversary proceeding against Robert Demello, Jr. ("Debtor"), objecting to the dischargeability of his debt owed to Sears under 11 U.S.C. §523 and objecting to his discharge under 11 U.S.C. §727. The Debtor filed an answer and counter-claim for attorney's fees under 11 U.S.C. §523(d). After conclusion of discovery, the Debtor filed a motion for summary judgment, to which Sears responded by filing a counter motion for summary judgment. For the reasons that follow, the

Debtor's motion is granted and Sears' motion is denied.

It is without dispute that this adversary proceeding arises from a consumer purchase of computer equipment from Sears by a authorized user of the Debtor's Sears charge account. Ms. Cassandra Demello (the former wife of the Debtor) purchased the equipment from Sears on June 11, 1994, and the equipment remains in her custody to date. Sears alleges that it maintains a security interest in the equipment, that the equipment is property of the estate, that the debtor improperly failed to schedule his interest in the equipment, that the debtor failed to file a statement of intention pursuant to 11 U.S.C. §521(2)(A) and failed to either reaffirm the debt, redeem the equipment, or surrender the equipment as required by §521(2)(B).

Under Federal Rule of Civil Procedure 56 (applicable to bankruptcy practice under Federal Rule of Bankruptcy Procedure 7056), summary judgment is granted only if "... there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party has the burden of establishing its right to summary judgment. See Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991). The evidence must be viewed in a light most favorable to the party opposing the motion. See Addickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970).

To analyze the Debtor's motion, I will assume that Sears holds a valid security interest in the equipment and that the equipment is property of the debtor's estate. I will also assume that the debtor improperly failed to file the statement of intentions required by §521(2)(A), and improperly failed to reaffirm the debt, redeem the equipment, or surrender the collateral as required by §521(2)(B).

Objections to dischargeability are construed strictly against a creditor and liberally in favor of a debtor. St. Laurent v. Ambrose (In re St. Laurent), 991 F.2d 672, 680 (11th Cir. 1993); Schweig v. Hunter (In re Hunter), 780 F.2d 1577, 1579 (11th Cir. 1993). Sears alleges that it is entitled to a determination of dischargeability under §523 by virtue of the debtor's failure to reaffirm the debt, redeem the collateral, or surrender the collateral. Section 523 sets forth sixteen categories of debt which are nondischargeable under 11 U.S.C. §727. Briefly stated, these categories are:

1. taxes;

2. debts incurred by false representations or fraud;

3. debts not scheduled in time for a creditor to file a proof of claim or a §523 or §727 action;

4. debts arising from fraud or defalcation while acting in a fiduciary capacity;

5. alimony or child support obligations;

6. wilful and malicious injuries;

7. fines and penalties;

8. student loans;

9. injury caused by driving while intoxicated;

10. debts subject to a previous denial of discharge;

11. final judgments or settlement agreements arising from fraud while acting in a fiduciary capacity to any depository institution or insured credit union;

12. malicious or reckless failure to fulfill any commitment to a federal depository or regulatory agency;

13. any payment of restitution under title 18 U.S.C.;

14. debts incurred to pay non-dischargeable taxes;

15. debts incurred in connection with a separation agreement or divorce decree; and

16. post-petition condominium ownership fees.

11 U.S.C. §523.

Sears does not argue that the Debtor's conduct falls within any of the above-listed exceptions to dischargeability. Instead, Sears asks this court to create a new ground for nondischargeability of a debt, to wit, the debtor's failure to file and perform a statement of intention under §521. It is well settled that exceptions to discharge are confined to the enumerated categories plainly expressed in the statute. Gleason v. Thaw, 236 U.S. 558, 35 S.Ct. 287, 59 L.Ed 717,(1915); In re Bernstein, 78 B.R. 619 (S.D. Fla. 1987). The debtor's failure to comply with §521 is

not enumerated as a cause for denying dischargeability and I will not create one.

Sears correctly notes that the provisions of §521 are mandatory, and that the Debtor may not unilaterally choose to retain collateral without redeeming it or reaffirming the debt. Taylor v. AGE Federal Credit Union (In re Taylor), 3 F.3d 1512 (11th Cir. 1993). However, §521 does not provide a remedy for a debtor's failure to follow these mandatory provisions. See, In re Trameling, 173 B.R. 627 (Bankr. W.D. Mich. 1994); In re Weir, 173 B.R. 682 (E.D. Cal. 1994). Therefore, Sears argues that the court has the authority under 11 U.S.C. §105[1] to deny the dischargeability of the debt notwithstanding the lack of authorization in either §§521 or 523.

As noted in Weir, Congress passed the current version of §521 after a "...long-term deadlock and begrudging compromise." 173 B.R. at 688. Although §521 imposes mandatory obligations upon the debtor, it fails to address a creditor's remedy when the debtor fails to comply. The original Senate bill 445 contained a provision whereby the automatic stay would terminate as to the collateral if

[1]11 U.S.C. §105 provides:
(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

the debtor failed to comply with the provisions of §521[2]. S.Rep. No. 98-65, 98th Cong., 1st Sess. 1-2 (1983). Congress eliminated automatic termination of the §362 stay as an appropriate remedy to prompt the debtor to comply with §521 and the Congressional record is silent as to any consideration given an even harsher remedy, denial of dischargeability for failing to comply with §521. Instead, it is clear that the creditor's appropriate remedy existed prior to enactment of §521, relief from the stay of §362(a) to pursue its state law remedies against the collateral. See Weir, at 684.

As with §523, 11 U.S.C. §727 enumerates specific instances justifying denial of the debtor's discharge. Stated briefly, these

---

[2]Senate Bill 445 provided:

(4) if the debtor's schedule of assets and liabilities includes consumer debts which are secured by property of the estate, the debtor shall file and serve...upon each creditor holding such security and the trustee, a statement expressing the debtor's intention with respect to the retention or surrender of the collateral...

> (b) At or before the conclusion of the meeting of creditors provided for by section 341 of this title, or upon such other date as the court in a specific case and in the exercise of its equitable powers may fix, the debtor shall perform his intention with regard to secured creditors, ... by surrendering such property to the creditor or the trustee; redeeming such property by paying the redemption price, or confirming his intention to paying the redemption price pursuant to section 722(b); or by reaffirming the debt. If the debtor has not fully performed his obligations under paragraph (3) of subsection (a) and this subsection at or before the meeting of creditors, the stay imposed by section 362(a) of this title shall terminate with respect to the enforcement of liens against such property, unless the court orders otherwise.

instances are when:

> 1. the debtor is not an individual;
>
> 2. the debtor improperly transferred or destroyed property of the estate within one year prior to the petition or any time after filing the petition;
>
> 3. the debtor concealed or destroyed material records;
>
> 4. the debtor knowingly provided false information under oath;
>
> 5. the debtor failed to explain any loss of assets;
>
> 6. the debtor has refused to obey a lawful order of the court;
>
> 7. the debtor committed any act specified in (2), (3), (4),(5), or (6) within one year prior to filing his petition;
>
> 8. the debtor has been granted a discharge under the Bankruptcy Act within six years prior to filing the petition; and
>
> 9. the debtor has been granted a discharge under the current Code within six years of filing the petition.

11 U.S.C. §727.

Again, Sears does not argue that the Debtor's conduct falls within one of these enumerated categories. The rules of construction applied to the §523 denial of dischargeability count also apply to §727 denial of discharge motions. See, In re Usoskin, 56 B.R. 805 (Bankr. E.D. N.Y. 1985) (Chapter 7 debtor's conduct, no matter how reprehensible, will not forfeit discharge unless it is covered by the enumerated categories of §727.). Furthermore, as outlined above, neither the terms of §521 nor its legislative

history suggests that Congress intended denial of discharge as an enforcement mechanism under §521. Therefore, neither §727 nor §521 authorizes the court to deny the debtor's discharge for non-compliance with §521.

As suggested in the above-cited cases and the legislative history of §521, a secured creditor's remedy for the debtor's violation of §521 is limited to relief from the automatic stay for the secured creditor to pursue any state law rights it may have against the collateral or allowing the stay to evaporate as a matter of law. See, 11 U.S.C. §362(c). Although Congress debated making this remedy self-enforcing, it ultimately left intact the requirement that creditors move for such relief upon the debtor's noncompliance.

When a creditor requests a determination of dischargeability, that creditor is liable for the debtor's costs and attorney's fees incurred to defend the action if the position of the creditor bringing the action is not substantially justified. 11 U.S.C. §523(d)[3]. Congress enacted §523(d) to prevent a creditor

[3] 11 U.S.C. §523(d) provides:
If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

from bringing an exception to dischargeability action in an attempt to obtain a settlement from an honest debtor anxious to avoid the attorney's fees necessary to defend the action. S. Rep. No. 989, 95th Cong. 2d Sess. 80 (1978).

Sears requested a denial of dischargeability based upon an arguable extension of the reasoning of the Court of Appeals of this Circuit in Taylor v. AGE Federal Credit Union (In re Taylor), 3 F.3d 1512 (11th Cir. 1993). As previously discussed, the Taylor court held that the debtor's compliance with §521 is mandatory, and that the Bankruptcy Court may utilize its equitable authority under 11 U.S.C. §105 to compel the debtor to comply. Because the issues raised in this case, a denial of dischargeability for failure to comply with §521, have never previously been addressed, awarding costs and fees under §523(d) would be unjust.

Having determined that the Debtor is entitled to summary judgment, it is unnecessary to address Sears' motion for summary judgment further.

It is therefore ORDERED that summary judgment be entered in favor of the Debtor. No monetary award is made.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this 12th day of February, 1996.